

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-006623

04/05/2019

HON. PAMELA GATES

CLERK OF THE COURT
K. Ballard
Deputy

JENNIFER HARRISON, et al.

JENNIFER HARRISON
13030 N 75TH DR
PEORIA AZ 85381

v.

KATIE HOBBS

DANIEL A ARELLANO

LESA ANTONE
13304 W STELLA LN
LITCHFIELD PARK AZ 85340
JEREMY BRONAUGH
15769 W MOHAVE ST
GOODYEAR AZ 85338
RUSSELL JAFFE
13304 W STELLA LN
LITCHFIELD PARK AZ 85340
COURT ADMIN-CIVIL-ARB DESK

CASE ON DISMISSAL CALENDAR
UNDER ADVISEMENT RULING

The court considered Defendant's Motion to Dismiss Plaintiffs' Complaint, Plaintiffs' Response, and Defendant's Reply. The court also considered the parties' oral argument on February 7, 2019.

In ruling on a Rule 12(b)(6) motion to dismiss, the court must "assume the truth of the well-pled factual allegations and indulge all reasonable inferences therein." *Cullen v. Auto-Owners Ins. Co.*,

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218 Ariz. 417, 419 ¶7 (2008). The court will not “speculate about hypothetical facts that might entitle the plaintiff to relief,” *id.* at 418-19 (citation and internal quotations omitted), nor will the court “accept as true allegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts.” *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389 (App. 2005); *Albabbagh v. Ariz. Dept. of Liquor License & Ctrl.*, 162 Ariz. 415, 417-18 (App. 1989)(“When testing a motion to dismiss for failure to state a claim, well-pleaded material allegations of the complaint are taken as admitted, but conclusions of law or unwarranted deductions of fact are not.”).

Both the United States and Arizona Constitutions embrace the guarantee of free and uninhibited discussion of public issues. *See* U.S. Const. Amend. 1; Ariz. Const., Art. 2, §6. However, also important is the social value that underlies the law of defamation and recognizes that “[s]ociety has a pervasive and strong interest in preventing and redressing attacks on reputation.” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990)(quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)); *Yetman v. English*, 168 Ariz. 71, 74 (1991).

In their Complaint, Plaintiffs alleged that Defendant Katie Hobbs posted a photograph on Defendant’s public Twitter, while representing herself as the Senate Minority Leader of the Arizona State Senate, and captioned the photo of the Plaintiffs as follows:

Governor Ducey, I hope you realize this woman is flashing a white supremacist sign. These are part of the group that shows up at the Capitol w/AR-15’s [sic] and harass elementary school children and democratic staff, calling them illegals. You must denounce¹

See Complaint at ¶¶4-5. To be defamatory, a publication must be false and must bring the defamed person into disrepute, contempt, or ridicule, or must impeach the Plaintiff’s honesty, integrity, virtue, or reputation. *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 341 (1989); *Turner v. Devlin*, 174 Ariz. 201, 205 (1993); *Milkovich*, 497 U.S. at 20 (“[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.”).

Therefore, to be actionable, Defendant’s statement, “this woman is flashing a white supremacist sign,” must be an objectively verifiable fact. *See Milkovich*, 497 U.S. at 20; *Yetman*, 168 Ariz. at

¹ The tweet connected to the photograph attached to the Complaint actually read: “Governor @dougducey I hope you realize this woman is flashing a white supremacist sign. These are part of the group that shows up at the Capitol w/AR-15’s [sic] and harass elementary school children and democratic staff, calling them illegals. You must denounce!”

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77 (“[I]n interpreting such comments, the publication is to be measured not by the ‘critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average [listener].’”)(citation omitted); *Palestine Herald-Press Co. v. Zimmer*, 257 S.W.3d 504, 510 (Tex. App. 2008)(examining whether the plaintiff “made an obscene gesture” is an objectively verifiable fact). The distinction between offensive and demeaning speech and speech that is provably false is often a difficult distinction. For example, a statement that a fictitious person, John Doe, is a member of the Ku Klux Klan is actionable because the statement is provably false. Conversely, the statement that John Doe is racist is not actionable because the term “racist” has no factually-verifiable meaning. *See, e.g., Stevens v. Tillman*, 855 F.2d 394, 403 (7th Cir. 1988)(holding that neither general statements charging a person with being racist, unfair, unjust, nor references to general discriminatory treatment, without more, constitute provably false assertions of fact); *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1440 (9th Cir. 1995)(holding that calling a judge “anti-Semitic” was non-actionable); *Ward v. Zelickovsky*, 643 A.2d 972, 980 (N.J. 1994)(accusation that plaintiffs “hated Jews” was non-actionable); *Covino v. Hagemann*, 627 N.Y.S.2d 894, 895 (N.Y. Sup. Ct. 1995)(dismissing defamation claim based on statement that plaintiff was “racially insensitive,” observing “an expression of opinion is not actionable as a defamation, no matter how offensive, vituperative, or unreasonable it may be” and “[a]ccusations of racism and prejudice” have routinely been found to constitute non-actionable expressions of opinion); *Williams v. Kanemaru*, 309 P.2d 972 (Haw. Ct. App. 2013)(accusation of racism is not actionable for defamation).

Here, the issue is whether a particular hand-gesture has a precise, objective, definite meaning and whether Defendant’s statement is an objectively verifiable fact. The court finds that the statement is not a provably false assertion of fact. *See Turner*, 174 Ariz. at 207 (“We can conceive of no objective criteria that a jury could effectively employ to determine the accuracy of [the defendant’s] assessment. Whether [the defendant’s] assessment is true or false is simply ‘not the kind of empirical question a factfinder can resolve.’”)(citation omitted); *Palestine Herald-Press*, 257 S.W.3d at 512 (holding that a defendant’s “statement that the gesture [plaintiff] made with his arms was ‘obscene’ . . . is an individual judgment that rests solely in the eye of the beholder and, as such, is not an objectively verifiable statement of fact.”); *McCaskill v. Gallaudet Univ.*, 36 F.Supp.3d 145, 159 (D.D.C. 2014)(“When a term[, in this case ‘anti-gay’,] admits of ‘tremendous imprecision [in] meaning and usage . . . in the realm of political debate,’ it takes a lot to conclude that it is a statement of fact Because different constituencies can hold different – and completely plausible – views of [p]laintiff’s actions, statements characterizing those actions constitute protected opinion.”)(quoting *Buckley v. Littell*, 539 F.2d 882, 893 (2nd Cir. 1976)); *Smith v. Sch. Dist. of Phila.*, 112 F.Supp.2d 417, 429 (E.D. Pa. 2000)(“While the court acknowledges that statement that plaintiff is ‘racists and anti-Semitic’ if it was made would be unflattering, annoying and embarrassing, such a statement does not rise to the level of defamation as a matter of law because it is merely non-fact based rhetoric.”); *Raible v. Newsweek, Inc.*, 341 F.Supp. 804, 807 (W.D. Pa. 1972)(“[T]o call a person a bigot or other appropriate name descriptive of his political,

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racial, religious, economic or sociological philosophies give no rise to an action for libel.”); *Burns v. Davis*, 196 Ariz. 155, 165 ¶39 (App. 1999)(“Statements that can be interpreted as nothing more than rhetorical political invective, opinion, or hyperbole are protected speech.”).

Moreover, “[t]o be actionable as a matter of law, defamatory statements must be published in such a manner that they reasonably relate to specific individuals.” *Hansen v. Stoll*, 130 Ariz. 454, 458 (App. 1981). The second statement, i.e., “these are part of a group that shows up at the Capitol w/AR-15’s [sic] and harass elementary school children and democratic staff, calling them illegals” does not state that Plaintiffs participated in the conduct. Although an individual does not need to be named, the publication must be “of and concerning” the Plaintiffs. *Id.* Statements that refer to an organization or a group do not necessarily implicate every member of the group. *Alexis v. D.C.*, 77 F.Supp.2d 35, 40 (D.D.C. 1999)(“Allegations of defamation by an organization or group and its members are not interchangeable.”); *Church of Scientology v. Time Warner, Inc.*, 806 F.Supp. 1157, 1160 (S.D.N.Y. 1992)(“Under the group libel doctrine, a plaintiff’s claim is insufficient if the allegedly defamatory statement referenced the plaintiff solely as a member of a group.”); *Jankovic v. Int’l Crisis Grp.*, 494 F.3d 1080, 1089 (D.C. Cir. 2007)(“Allegations of defamation by an organization and its members are not interchangeable. Statements which refer to individual members of an organization do not implicate the organization. By the same reasoning, statements which refer to an organization do not implicate its members.”). Plaintiffs’ Complaint fails to state a claim under which relief can be granted.

As part of her Motion to Dismiss, Defendant asserts that she is entitled to an award of attorneys’ fees because Plaintiffs violated A.R.S. §12-752(A) in filing their lawsuit. Section 12-752(A) seeks to protect people from strategic lawsuits against public participation or “SLAPPs” – that is from illegitimate lawsuits designed to discourage free speech on issues of public interest. To qualify for protection under the statute, Defendant’s tweet must be a:

Written or oral statement that falls within the constitutional protection of free speech and that is made part of an initiative, referendum or recall effort or that is all of the following: a) Made before or submitted to a legislative or executive body or any other governmental proceeding[;] b) Made in connection with an issue that is under consideration or review by a legislative or executive body or any other governmental proceeding[;] c) Made for the purpose of influencing a governmental action, decision or result.

A.R.S. §12-751(1)(a)-(c). In enacting the anti-SLAPP statute in 2006, the Arizona legislature explicitly declared, “[i]t is in the public interest and it is the purpose of this article to strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons of petition, speech and association, to protect and encourage public participation in government to the maximum extent allowed by law, to establish an efficient process for

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identification and adjudication of strategic lawsuits against public participation and to provide for costs and attorney fees.” *See* A.R.S. § 12-751, Section 2(C). The tweet at issue to “Governor @dougducey” to “denounce” is not the type of speech for which the legislature obligated the court to enter an award of attorneys’ fees and costs.

IT IS ORDERED granting Defendant’s November 6, 2018 Motion to Dismiss.

IT IS FURTHER ORDERED placing this matter on the Dismissal Calendar for dismissal with no further notice on or after **April 29, 2019** unless prior to that date, a proposed form of Judgment pursuant to Arizona Rules of Civil Procedure 54(c) is lodged, a Stipulation for Dismissal is filed; or a Motion to Continue on the Dismissal Calendar is filed setting forth good cause for the requested relief.